

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

In late 2009, OWCP accepted that appellant, then a 52-year-old city letter carrier, sustained work-related bilateral tarsal tunnel syndrome, right tibialis tendinitis, other right-sided calcaneus deformity and tenosynovitis of her left foot and ankle. Appellant stopped work on September 9, 2008. On September 10, 2008 she underwent a calcaneal osteotomy, flexor digitorum longus tendon transfer and tarsal tunnel release and, on January 23, 2009, she had surgical hardware removed.

On August 29, 2011 Dr. Richard Katz, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant had an eight percent permanent impairment of her right leg and a seven percent permanent impairment of her left leg under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). He indicated that appellant had reached maximum medical improvement on June 11, 2010.

In a September 29, 2011 award of compensation, OWCP granted appellant a schedule award for eight percent permanent impairment of her right leg and seven percent permanent impairment of her left leg. The award ran for 43.2 weeks from June 11 to April 9, 2011.

In a February 6, 2012 letter, appellant requested reconsideration of her claim. She alleged various errors in OWCP's September 29, 2011 schedule award decision, including errors with respect to the degree of her leg impairment, the date of maximum medical improvement and the period that the award ran. Appellant also argued that Dr. Katz' second opinion medical examination was incomplete or cursory in nature and that inadequate testing was performed. She felt that Dr. Katz incorrectly found that she had no motor or sensory loss in her legs because he did not perform the proper tests.

Appellant submitted a July 9, 2009 treatment note discussing the cause of her tarsal tunnel condition, a January 5, 2010 physical therapy note detailing a therapy session and an April 13, 2010 Form CA-17 describing work restrictions. She also submitted an August 9, 2011 treatment from Dr. Thomas Kirsits, an attending podiatrist, in which he discussed her pain symptoms. In a January 12, 2012 letter, Dr. Kirsits discussed appellant's work tolerances and limitations, opined that she had impairment in both feet and stated that she reached maximum medical improvement on February 17, 2010.

In a May 11, 2012 decision, OWCP denied appellant's reconsideration request noting that the submitted evidence and argument was repetitious or irrelevant to the main issue of the case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a

² Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.³ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁵ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁶ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁷ While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁸

Physical therapists are not physicians under FECA and are not qualified to provide opinions on medical matters.⁹

ANALYSIS

OWCP issued a merit decision on September 29, 2011. Appellant requested reconsideration of this decision in a February 6, 2012 letter.

As noted above, the Board does not have jurisdiction over the September 29, 2011 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim.

In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument.

In a February 6, 2012 letter, appellant requested reconsideration of her claim. She alleged various errors in OWCP's September 29, 2011 schedule award decision, including with respect to the degree of her leg impairment, the date of maximum medical improvement and the period that the award ran. Appellant also argued that the second opinion medical examination was incomplete or cursory in nature and that inadequate testing was performed.

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at C.F.R. § 10.608(b).

⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁷ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁸ *John F. Critz*, 44 ECAB 788, 794 (1993).

⁹ *Jane A. White*, 34 ECAB 515, 518-19 (1983).

The Board notes that the underlying issue in this case was whether appellant met her burden of proof to present medical evidence showing that she has more than an eight percent permanent impairment of her right leg and a seven percent permanent impairment of her left leg. That is a medical issue which must be addressed by relevant medical evidence.¹⁰ Thus, appellant's above-described arguments on medical matters are not relevant to the main issue of this case.

A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case.

Appellant submitted a July 9, 2009 treatment note, a January 5, 2010 physical therapy note and an April 13, 2010 Form CA-17. These were duplicates of those in file at the time of the previous decision and therefore would not require reopening of appellant's case for merit review.¹¹ Furthermore, physical therapists are not defined as physicians under FECA and their conclusions are not considered as medical evidence.¹²

Appellant submitted an August 9, 2011 treatment from Dr. Thomas Kirsits, an attending podiatrist. The note does not provide an impairment rating and is irrelevant to the main issue of this case. Therefore, it does not provide a basis for reopening the claim.

In a January 12, 2012 letter, Dr. Kirsits discussed appellant's work tolerances and limitations, opined that she had impairment in both feet and stated that she reached maximum medical improvement on February 17, 2010. He did not provide an impairment rating. The report is irrelevant to the issue of impairment and its submission is not a basis for reopening the claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹³

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹¹ See *supra* note 6.

¹² See *supra* note 9.

¹³ On appeal, appellant questioned the number of weeks of wage-loss compensation she received. However, this matter is not currently before the Board.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board